Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

80-412

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GOOD HOPE REFINERIES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

MEAGHER & HREBEK,
Attorneys for Petitioner,
2517 Highway 35,
Manasquan, New Jersey 08736
(201) 528-7313

ROBERT J. HREBEK
On the Petition

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

QUESTIONS PRESENTED FOR REVIEW

1. Whether an employee's right to request union representation at an interview reasonably believed to be investigatory with disciplinary overtones, and guaranteed by Section 7 of the National Labor Relations Act, 29 *U.S.C.* §157, may be deemed a mandatory subject of negotiations.

2. Whether a unilateral change in a collective bargaining agreement provision concerning an employee's right to representation at an investigatory interview may constitute an unfair labor practice in violation of Section 8(a)(5) of the National Labor Relations Act, 29 *U.S.C.* §158(a)(5), if the right to such representation is "individual" and not otherwise a mandatory subject of negotiations.

TABLE OF CONTENTS

Questions Presented for Review i

Opinions Below 1

Jurisdiction 1

Statutes 1

Statement of the Case 5

REASONS FOR THE ALLOWANCE OF THE WRIT:

Introduction 8

POINT I: It was error to declare an employee's right to request Union representation as guaranteed by Section 7 of the National Labor Relations Act to be a mandatory subject to negotiations 9

POINT II: It was error to find a unilateral change in a collective-bargaining agreement provision concerning an employee's right to representation at an investigatory interview may constitute an unfair labor practice in violation of Section 8(a)(5) where that right is "individual" and not otherwise a mandatory subject of negotiations 13

Conclusion 15

CASES CITED:

Allied Chemical & Alkali Workers v. P.P.G. Co., 404 U.S. 157 (1971) 13, 14

Garment Workers v. Quality Mfg. Co., 420 U.S. 276 (1975) 9

Mobil Oil Corp., 196 NLRB 1052 (1972) 10

TABLE OF CONTENTS

CASES CITED:

NLRB v. American Nat. Ins. Co.,
343 U.S. 395 (1952) 11

NLRB v. Katz,
369 U.S. 736 (1962) 10, 11

NLRB v. Magnavox Co.,
415 U.S. 322 (1974) 11, 12

NLRB v. Weingarten, Inc.,
420 U.S. 251 (1975) 8, 9, 10, 11, 12, 14

NLRB v. Wooster Division of Borg-Warner Corp.,
356 U.S. 342 (1958) 11

U.S. CODE CITED:

28 U.S.C. §1254(1) 1

National Labor Relations Act:

29 U.S.C. §157 ..... 2, 8, 9, 10, 12, 13, 14

29 U.S.C. §158(a)(1) 5, 6, 7

29 U.S.C. §158(a)(5) 2, 6, 7, 8, 9, 10, 13, 14

29 U.S.C. §158(d) 2

29 U.S.C. §160(f) 7

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

Appendix A
Decision of the Circuit Court 1sa

Appendix B
Decision and Order
with ALJ Decision attached 8sa

Appendix C
Judgment 33sa

Appendix D
Petition for Review and Cross Application of An
Order of the National Labor Relations Board .. 34sa

SUPREME COURT OF THE UNITED STATES

No.

GOOD HOPE REFINERIES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OPINIONS BELOW

The opinions below are as follows:

National Labor Relations Board decision and order, 245 *NLRB* No. 39, to which is appended the decision of the Administrative Law Judge. Appendix B.

United States Court of Appeals for the Fifth Circuit, opinion, docket No. 79-3580, on the summary calendar, — F.2d — (5th Cir. 1980). Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (docket No. 79-3580) was filed on June 23, 1980. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

STATUTES

The statutes involved in this case are set forth below as follows:

1. National Labor Relations Act, Section 7, 29 *U.S.C.* §157, rights of employees:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in labor organization as a condition of employment as authorized in Section 8(a)(3) [29 *U.S.C.* § 158(a)(3)].

2. National Labor Relations Act, Section 8(a)(1) and (5), 29 *U.S.C.* §158(a)(1), unfair labor practices:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [29 *U.S.C.* §157];
>
> * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [29 *U.S.C.* §159(a)].

3. National Labor Relations Act, Section 8(d), 29 *U.S.C.* §158(d):

> (d) The purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in

good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days

after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a) 29 *U.S.C.* §159(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in any strike within the appropriate period specified in subsection (g) of this Section, shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of Sections 8, 9, and 10 of this Act, as amended 29 *U.S.C.* §§158, 159, 160, but said loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this Section 8(d) shall be modified as follows:

(A) The notice of Section 8(d)(1) shall be ninety days; the notice of Section 8(d)(3) shall be sixty days; and the contract period of Section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of dispute shall

be given by the labor organization to the agencies set forth in Section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a setlement of the dispute.

STATEMENT OF THE CASE

This case arises out of an unfair labor practice charge filed on October 5, 1978, by the Oil, Chemical and Atomic Workers International Union, Local 4-447, against Good Hope Refineries, Inc., alleging conduct contrary to Section 8(a)(1) of the National Labor Relations Act, as amended (GC-1(a).)* This charge was amended on October 30, 1978, further alleging violations of Sections 8(a)(3) and (5) by reason of a disciplinary warning given for invoking a right to union representation at an employer-conducted interview and for refusing to bargain with the union about said employer-conducted interviews (GC-1(c).)

On November 3, 1978, a formal Complaint and Notice of Hearing were issued, Case No. 15-CA-7069, alleging that, during the interview held with employee Gary Sullivan he had reasonable grounds to believe matters discussed therein would result in disciplinary action and that the employer improperly refused a request for union representation (GC-1(e).)

* References in this Section are to the joint appendix which is part of the record before the Fifth Circuit below.

On January 18, 1979, the Board amended its Complaint to include the allegation that employee Gail Simmons had been impliedly threatened for his attempt to represent employee Sullivan during the earlier interview (GC-1(j).)

A hearing was held before an Administrative Law Judge on February 20, 1979, and on May 11, 1979, a decision was issued. See Appendix B. The ALJ stated the main issue as "simply one of whether Sullivan reasonably feared his interview would result in discipline" 23sa; and he found that employee Sullivan had such reasonable fear. He also found that the employer's 25sa direction to employee Simmons to report with representation to explain his actions in attempting to represent employee Sullivan was a violation of Section 8(a)(1). He further found that employees were "denied union representation during (absence counselling) interviews" 27sa and that that change represented a contract change involving a mandatory subject of bargaining in violation of Section 8(a)(5).

On September 26, 1979, the National Labor Relations Board issued its Decision and Order, affirming with certain modifications. See Appendix B. The Board found that the change of having employees report to the Personnel Office rather than to their immediate supervisor on their return to work was "a valid exercise of management right" 9sa n.3. However, the Board went on to find that Respondent's collective-bargaining agreement was changed to prohibit representation during all such counselling sessions and found that change to be an unlawful refusal to bargain contrary to Section 8(a)(5) (*Id.*).

On October 29, 1979, a Petition for Review was filed by Good Hope Refineries, Inc., before the United States Court of Appeals for the Fifth Circuit, and, on January 8,

1980, the Board filed its Cross-Application for Enforcement, both under jurisdiction of 29 *U.S.C.* §160(f).

On June 23, 1980, the Fifth Circuit filed its opinion in the case, concluding that substantial evidence in the record as a whole supported the Board's finding, denying the Petition for Review and ordering the Board's Order enforced. Appendix A, 7sa. The Court found that Good Hope's alteration of its employee counselling system contrary to the collective-bargaining agreement constituted a violation of Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§158(a)(1) and (5), deeming the modification to be one of mandatory subject of bargaining and thus one upon which an unfair labor practice under Section 8(a)(5) might be found. Appendix A, 6-7sa.

Judgment was entered on June 23, 1980, Appendix C. Petitioner, Good Hope Refineries, Inc., moved for and was granted a recall and stay of issuance of mandate pending Petition for Writ of Certiorari on August 27, 1980 and until September 15, 1980. See Appendix D.

This Petition for a Writ of Certiorari is being submitted within the period of the stay of mandate to contest the finding of an unfair labor practice contrary to Section 8(a)(5) of the Act for modification of a collective-bargaining provision dealing with a right which is individual and not a mandatory subject of bargaining.

REASONS FOR THE ALLOWANCE OF THE WRIT

Introduction

Certiorari should be granted to settle the very important question of whether a right guaranteed under Section 7 of the National Labor Relations Act, 29 *U.S.C.* §157, as an individual right and considered an individual right in the case of *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), may be deemed a mandatory subject of bargaining and thus a right susceptible to being included or excluded from a collectively-negotiated contract between an employer and the individual employee's majority representative.

Section 7 of the Act guarantees an employee the right to insist upon representation at an interview he reasonably believes will result in disciplinary action. It is a right uniquely held by the individual and its application under *Wengarten* is uniquely individual, dealing with the objective motivation of the individual employee of his individual belief that the investigation will result in disciplinary action. See *Weingarten*, 420 U.S. at 257 and n.5. If this right is deemed a mandatory subject of bargaining, then it may be excluded in its entirety from a collectively-negotiated agreement between an employer and that employee's majority representative. However, if, as is suggested here, that right belongs to the individual employee alone, then it may not be a mandatory subject of bargaining susceptible to being bargained away.

In addition, certiorari should be granted to determine whether a modification of a contract provision which no more than sets forth the individual's right to representation at an investigatory interview can be the basis for an unfair labor practice finding under Section 8(a)(5) of the Act,

29 *U.S.C.* §158(a)(5). If the subject matter is not a mandatory subject of bargaining, then it is permissive only, or less, and cannot properly be said to invoke a duty to bargain where that duty attaches only to mandatory subjects of bargaining.

Point I

It was error to declare an employee's right to request Union representation as guaranteed by Section 7 of the National Labor Relations Act to be a mandatory subject of negotiations.

The Fifth Circuit improperly declared that an employee's right to representation at an employer-employee interface which is investigatory in nature was a mandatory subject of bargaining. By that declaration the Circuit exposed the individual employee's right, guaranteed under Section 7 of the Act, to the give and take of the bargaining table as a mandatory subject upon which either the majority representative or the employer may bargain to impasse and out of existence. Moreover, it applied the uniquely individual Section 7 right to *all* employer-employee interviews regardless of the required subjective motivation which must be examined on a case by case basis and as was set forth in *NLRB v. Weingarten, Inc., supra,* 420 *U.S.* at 257 and n.5.

An employee's right to refuse to submit to an interview without union representation where he reasonably fears that interview will result in disciplinary action was upheld as a right arising out of Section 7 of the Act in *NLRB v. Weingarten, Inc., supra,* and *Garment Workers v. Quality Mfg. Co.,* 420 U.S. 276 (1975). As explained in *Weingarten,* it is a uniquely individual right and arises in the first in-

stance where the individual employee requests representation. 420 U.S. at 257. Its exercise is further individualized by placing on it a requirement that it be "limited to situations where the employee reasonably believes the investigation will result in disciplinary action." *Id.* (footnote omitted). And the employee's belief is further individually gauged by an objective standard. *Id.* at n.5. It is a right measured entirely by the individual, not the collective.

In discussing this right under Section 7, the Court quoted from an earlier Board case, *Mobil Oil Corp.*, 196 *NLRB* 1052 (1972), wherein the Board stated that "it is a serious violation of the employee's *individual* right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy." See *Weingarten*, 420 U.S. at 257. (Emphasis added.) It was viewed as an individual right by the Board and that view was approved by this Court. It constituted a special protection to "a lone employee" attending an interview which he believes will adversely impact upon his employment. *Id.* at 262. It is a statutory right enjoyed by the individual and defined by the individual standard.

It is submitted that this Section 7 right to representation is so uniquely individual, and individually judged, that it cannot be a mandatory subject or bargaining as that term has been defined under Section 8(d) of the Act, 29 U.S.C. §158(d). That statutory provision requires good-faith bargaining "with respect to wages, hours, and other terms and conditions of employment . . ., or any question arising thereunder, and establishes the mandatory subjects of bargaining . *NLRB v. Katz*, 369 U.S. 736, 743 (1962). As to these mandatory subjects, "neither party is legally obligated to yield." *NLRB v. Wooster*

Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (citing *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395 (1952)). Consequently, and failing agreement, negotiations on a mandatory subject may reach a point of "impasse" whereupon the employer would be free to implement unilaterally the identical proposal upon which impasse had been reached. See *NLRB v. Katz, supra*, 369 U.S. at 745 n.12. Conversely, a permissive subject of bargaining may not be insisted upon as a condition to reaching agreement, and may not be insisted upon to the point of impasse. See *NLRB v. Wooster, supra*, 356 U.S. at 349.

If the right to representation borne out of Section 7 is upheld as a mandatory subject of bargaining, then although a majority representative may insist to impasse that the matter be included in an agreement, so too may the employer insist on precisely the opposite language and insist to impasse that there be no right to representation. And once impasse was reached, the employer would then be within its rights to implement, thus stripping the individuals of any right to representation. It is submitted that this is the natural and legal consequence of declaring the right to representation to be a mandatory subject of bargaining. Yet it is submitted that this would ill carry out the policy of the Act.

It is of course acknowledged that a union "may waive important §7 rights in the course of collective bargaining." *NLRB v. Magnavox Co.*, 415 U.S. 322, 327 (1974) (Stewart). And in *Weingarten* it is noted that a number of bargaining agreements contain pronouncements of representation rights at investigatory interviews. 420 U.S. at 267 and n.11. However, the fact that numerous agreements contain such a right is not dispositive of the issue but reflects merely a harmony with the statutory right. See 420 U.S. at 267.

Consideration of Section 7 rights must encompass a balancing between individual and collective interests which will carry out the policy of the Act. *Magnavox, supra,* 415 U.S. at 326. Thus, one standard might apply to a right sounding largely in the economic area, such as waiving the right to strike during the period of an agreement. *Id.,* 415 U.S. at 325. But a different standard must be applied to a Section 7 right as uniquely individual as the right to representation at an investigatory interview. See *Id.*

It is submitted that the very existence of the Section 7 right to representation as a statutory right, independent of any contract provision, see *Weingarten, supra,* 420 U.S. at 267, weighs heavily against considering that right a mandatory subject of bargaining. Similarly, the individual interest protected by that Section 7 right far overcomes any interest which the majority representative might have. See *Magnavox, supra,* 415 U.S. at 326.

It is submitted that the Section 7 right to representation is so closely linked to the individual as to deny both the majority representative and the employer any legitimate interest in bargaining the matter as a mandatory subject. Its existence as a statutory right under Section 7 must not be destroyed by declaring it to be a mandatory subject of bargaining. It is one thing to declare the Section 7 right to be a permissive subject which may be expanded upon as an otherwise existing statutory right and incorporated in an agreement between the parties; but it is quite another thing to subject this Section 7 right—which belongs to the individual employee—to the inexorable push and pull of the bargaining table as a mandatory subject.

It is submitted that the Fifth Circuit erred in declaring this individual right under Section 7 to be a manda-

tory subject of bargaining. It is further submitted that the Court should have gone no further then to declare it to be a permissive subject of negotiations so as to preserve to the individual the right guaranteed by Section 7 and *Weingarten.*

Point II

It was error to find a unilateral change in a collective-bargaining agreement provision concerning an employee's right to representation at an investigatory interview may constitute an unfair labor practice in violation of Section 8(a)(5) where that right is "individual" and not otherwise a mandatory subject of negotiations.

It is submitted that the Fifth Circuit's decision that the Company's unilateral change in its collective-bargaining agreement was a violation of Sections 8(a)(1) and (5) was based upon the erroneous conclusion that the subject of the change, failing to permit representation during counselling sessions contrary to the collective-bargaining agreement, was a mandatory subject of bargaining. It is submitted that because that right to representation was an individual one arising out of Section 7 of the Act and not otherwise a mandatory subject of negotiations, the change or "modification" in the contract was no more than a change in a permissive subject of bargaining and thus not a prohibited unfair labor practice. *Allied Chemical & Alkali Workers v. P.P.G. Co.*, 404 U.S. 157, 185 (1971).

Because the Section 7 right to representation at an investigatory interview is so uniquely an individual right and one which should not be a mandatory subject of negotiations, it must therefore be deemed a permissive subject

of bargaining. As such, the Section 7 right may be memorialized in a collective-bargaining agreement as an expression of the statutory right, see *Weingarten, supra*, 420 U.S. at 267; but that expression of right does not alter its character from one of a permissive subject to that of a mandatory subject. *Allied Chemical & Alkali Workers, supra*, 404 U.S. at 187. It remains a permissive term despite the fact that the parties have included it in a contract.

It is submitted that under the *Allied Chemical & Alkali Workers* case a unilateral change in a permissive subject of bargaining cannot form the basis for finding an unfair labor practice under Section 8(a)(5) of the Act. 404 U.S. at 188. Such a holding would not remove the contract right. 404 U.S. 181 n.20. Nor would it dilute the statutory right under Section 7. Rather, it simply preserves the right as a permissive subject and denies it mandatory-subject-bargaining status which could otherwise destroy that right. It recognizes no more than that the subject is a permissive one and not one over which the parties have a mandatory obligation to bargain, nor one upon which, not having that mandatory obligation, might form the basis of a refusal to bargain under Section 8(a)(5).

It is submitted that had the Fifth Circuit correctly denoted the Section 7 right to representation at an investigatory interview as not being a mandatory subject of negotiations, but as one which is a permissive term only, the Court could not have found a breach of duty under Section 8(a)(5) of the Act.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court grant this Petition for a writ of Certiorari.

Respectfully submitted,

MEAGHER & HREBEK
Attorneys for Petitioner

By /s/ Robert J. Hrebek
ROBERT J. HREBEK

SUPPLEMENTAL APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 79-3580

GOOD HOPE REFINERIES, INC.,

Petitioner Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

Summary Calendar, Fed.R.App.P. 34(a); 5th Cir. R. 18.

DECISION OF THE CIRCUIT COURT

(Filed June 23, 1980)

Employer petitioned for review of an order of the National Labor Relations Board finding that it had committed unfair labor practices. Board cross-applied for enforcement. The Court of Appeals held that: (1) substantial evidence supported the Board's determination that the employer committed unfair labor practices when it required an employee to participate in an absence-counseling interview without union representation and when it required a union steward, under threat of discipline, to account for his efforts to represent the employee, and (2) the employer committed an unfair labor practice by unilaterally altering the established practice of allowing union representation during absence-counseling interviews.

Petition to review denied; order enforced.

1. Labor Relations—key 680

On review of National Labor Relations Board order, Court of Appeals is limited to determination whether Board's conclusions are supported by substantial evidence on the record as a whole. National Labor Relations Act, §10(e) as amended 29 U.S.C.A. §160(e).

2. Labor Relations—key 572

Substantial evidence supported determination of National Labor Relations Board that employer committed unfair labor practices by requiring employee to participate without union representation in absence-counseling interview, an interview with employer concerning employee's absence from work, and by requiring union steward, under threat of discipline, to account for his efforts to represent employee. National Labor Relations Act, §8(a)(1) as amended 29 U.S.C.A. §158(a)(1, 5).

3. Labor Relations—key 572

Employer's unilaterally altering established practice of allowing union representation during absence-counseling interviews with employees constituted unfair labor practice. National Labor Relations Act, §8(a)(1, 5) as amended 29 U.S.C.A. §158(a)(1, 5).

4. Labor Relations—key 393

Employer breaches its duty to bargain when it alters existing wages, hours and other terms and conditions of employment without notifying and conferring with employee's statutory bargaining representative and employer's unilateral modification of mandatory subject of bargaining is unfair labor practice. National Labor Relations Act, §§8(a)(1, 5), (d) as amended 29 U.S.C.A. §§158(a)(1, 5), (d).

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before RONEY, KRAVITCH and TATE, Circuit Judges.

PER CURIAM:

The issues in this unfair labor practice case involve the ability of an employee to have union representation at an absence counseling session, an interview with the employer concerning the employee's absence from work. The National Labor Relations Board found that the employer violated section 8(a)(1) of the National Labor Relations Act when it required an employee to participate in an absence counseling interview without union representation, and disciplined him for refusing to fully participate in that interview, and by requiring a union steward, under threat of discipline, to account for his efforts to represent the employee. The Board also found that the employer had violated sections 8(a)(1) and (5) of the Act by unilaterally altering the established practice of allowing union representation during absence counseling interviews. Because the Board's conclusions are supported by substantial evidence, we deny the employer's petition for review and enforce the Board's order on its cross-petition.

According to the Board's findings, prior to September 6, 1978, counseling by employer Good Hope Refineries, Inc. of employees regarding absences was conducted by the employee's immediate supervisor, generally on the job. Effective September 6, Good Hope changed the policy. Employees were now to report directly to the personnel office upon their return from an absence, and contrary to prior procedure, they were not necessarily entitled to be accompanied by a union representative.

On September 8, employee Gary Sullivan, who had been absent from work three days, refused to answer the personnel manager's inquiries without the presence of a union representative. The personnel manager told Sullivan before the meeting that union assistance was unnecessary, but acceded to Sullivan's request, allowing a union representative to be present. He resolved the absence questions. Afterward he reiterated that union assistance at the interview was unnecessary and stated that Sullivan's refusal to answer questions while unassisted constituted insubordination. The personnel manager placed a letter to that effect in Sullivan's file.

The Board concluded Sullivan was forced to submit without union representation to an interview which he reasonably feared may have resulted in his discipline, and on that basis found a violation of section 8(a)(1). A second violation was found in requiring the union representative to account for his efforts, and threatening him with discipline in connection with those efforts. The Board ordered Good Hope to remove from all employee records any disciplinary warnings issued either to Sullivan or other employees in connection with this policy, and to cease and desist from similar or related unfair labor practices.

[1] A review in this Court is limited to a determination whether the Board's conclusions are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91, 71 S. Ct. 456, 463-66, 95 L.Ed. 456 (1951); National Labor Relations Act §10(e), 29 U.S.C.A. §160(e).

Resolution of the issue is controlled by *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, 43 L.Ed.2d 171 (1975), which held an employee may refuse to submit to an employer interview without union representation, if

the employee reasonably fears the interview may result in discipline. *See also International Ladies' Garment Workers Union v. Quality Manufacturing Co.*, 420 U.S. 276, 95 S. Ct. 972, 43 L.Ed.2d 189 (1975).

[2] Substantial evidence supports the Board's conclusions. The personnel manager questioned Sullivan without offering him the option of having the aid of his union. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. at 258-59, 95 S. Ct. at 964. The Board's finding that "Sullivan reasonably feared the September 8 interview could result in discipline" is supported by the record, since the personnel manager had the clear authority to decide whether an absence would be excused. Company employees had recently been informed that unapproved absences could result in disciplinary action, including verbal and written warnings, suspension and termination. There was also evidence revealing the absence counseling interview was investigatory in nature, a fact recognized by Sullivan.

The efforts of Sullivan's fellow union member on his behalf were also protected under the Act. *International Ladies' Garment Workers Union v. Quality Manufacturing Co.*, 420 U.S. at 280, 95 S. Ct. at 974; National Labor Relations Act §7, 29 U.S.C.A. §157. Substantial evidence supports the Board's conclusion that the personnel manager's response to the union steward's efforts placed him in reasonable fear that the counseling interview would result in his own discipline. By discouraging union assistance for Sullivan during his absence counseling session, the employer violated section 8(a)(1).

[3] The Board concluded that the employer's alteration of the employee counseling system worked a unilateral change in the collective bargaining agreement, and violated sections 8(a)(1) and (5) of the Act, 29 U.S.C.A.

§§158(a)(1), (5). It ordered the employer to cease and desist from instituting unilateral policies regarding absence counseling sessions.

[4] Substantial evidence supports the Board's conclusion. An employer breaches its duty under sections 8(a)(5) and 8(d) of the Act, 29 U.S.C.A. §§158(a)(5), (d), when it alters existing wages, hours and other terms and conditions of employment without notifying and conferring with the employees' statutory bargaining representative. *NLRB v. Katz*, 369 U.S. 736, 742-43, 82 S. Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir. 1980). An employer's unilateral modification of a mandatory subject of bargaining is an unfair labor practice under the Act. *See Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971); *Axelson, Inc. v. NLRB*, 599 F.2d 91, 93 (5th Cir. 1979); National Labor Relations Act §§8(a)(1), (5), 29 U.S.C.A. §§158(a)(1), (5).

On its face, the employer counseling system implemented September 6 changed only minor details, since employees were directed to report to the personnel manager, rather than to their immediate supervisors. In practice, however, the system denied an employee the opportunity to seek union representation at such an encounter. Substantial evidence supports the Board's conclusion that the employer had never before denied union representatives the opportunity to accompany employees during absence counseling sessions.

The Board determined that alteration of the counseling policy was a mandatory subject of bargaining, because it altered a term and condition of employment. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d at 1342; *see*

Ford Motor Co. v. NLRB, 441 U.S. 488, 497, 99 S. Ct. 1842, 1849, 60 L.Ed.2d 420 (1979) ("Construing and applying the duty to bargain and the language of §8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function."). The matter here had a direct impact on the employment relationship, since the employee's refusal to submit to the counseling session in the absence of union representation became a permanent part of an employee's personnel file which could affect his future job security. *See NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427, 431 (5th Cir. 1976). *See generally Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971). The Ninth Circuit has recently held an employer "was required to bargain over any change in its policy concerning union representation at meetings with its employees." *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 412 (9th Cir. 1978); *cf. NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427 (5th Cir. 1976) (change in discipline system held mandatory subject of bargaining).

Because the policy change had the effect of altering the collective bargaining relationship, we uphold the Board's determination that the employer's failure to bargain with the union on this issue was an unfair labor practice. *See NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978).

Concluding substantial evidence on the record as a whole supports the Board's findings, its order is due to be enforced.

PETITION TO REVIEW DENIED; ORDER ENFORCED.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CA-7069

GOOD HOPE REFINERIES, INC.

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 4-447

DECISION AND ORDER

On May 11, 1979, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of

1. We agree with the Administrative Law Judge that the absence counseling interview of employee Gary Sullivan was an investigatory one with disciplinary overtones and thus one requiring that Sullivan be afforded representation as set forth in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Accordingly, we find it unnecessary to rely on the Board's decision in *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), as the Administrative Law Judge did in fn. 4 of his Decision, as that case dealt with a situation concerned solely with disciplining an employee.

2. We find that the warning issued to Sullivan for refusing to answer questions without a union representative being present

the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.[4]

---

violated Sec. 8(a)(1) of the Act. *N.L.R.B. v. Weigarten, Inc., supra,* and *International Ladies Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Manufacturing Co., et al.,* 420 U.S. 276 (1975). In so doing, however, we find it unnecessary to determine whether the warning issued to Sullivan violated Sec. 8(a)(3) of the Act, as found by the Administrative Law Judge, inasmuch as said additional finding would not affect our remedial order. Accordingly, the Administrative Law Judge's Conclusion of Law 5 is hereby modified by substituting the word "8(a)(1)" for the word "8(a)(3)" and par. 2(b) of his recommended Order shall also be modified to conform to this finding. While the Administrative Law Judge found that Respondent's unilateral change in its absence counseling system violated Sec. 8(a)(5) of the Act, he failed to find that such conduct also violated Sec. 8(a)(1) of the Act. Thus, his Conclusion of Law is also hereby modified by including the words "and 8(a)(1)" after the words "Section 8(a)(5)." We also shall modify par. 2(c) of his recommended Order to conform to the scope of the refusal to bargain violation found; namely, making unlawful unilateral changes in the terms and conditions of employment of the unit employees.

3. We agree with the Administrative Law Judge that Respondent's refusal to allow employees representation under its new absence counseling system constituted a violation of Sec. 8(a)(1) of the Act under the Supreme Court's *Weingarten* decision, *supra,* and also a violation of Sec. 8(a)(5) and (1) of the Act as a unilateral change in the parties' collective-bargaining agreement. However, we find that the change in Respondent's absence counseling system requiring that employees report to the personnel office rather than to their immediate supervisor, as had been the practice previously, was, under the circumstances herein, a valid exercise of a management right. Thus, we find only the failure to permit representation during such counseling sessions to be unlawful. Accoringly, we shall modify the Administrative Law Judge's recommended Order by deleting therefrom that portion of the Order requiring Respondent to rescind its new policy on absence counseling adopted on August 29, 1978, and put into effect September 6, 1978, or requiring Respondent to bargain upon request about that new policy.

4. The Administrative Law Judge recommended that the Board issue a broad cease-and-desist order in this case. However, as we do not find Respondent's conduct herein to be egregious as to war-

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Good Hope Refineries, Inc., Good Hope, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, by requiring its employees to account for their efforts to represent other employees in accordance with the terms of the collective-bargaining contract and by threatening to discipline its employees for their efforts to represent other employees in accordance with the terms of the collective-bargaining contract.

(b) Discouraging activities protected by the Act, by disciplining its employees for refusing to fully participate in supervisory interviews when the employee requests and is entitled to union representation.

(c) Requiring any employee to take part in any absence counseling session without union representation if such representation has been requested by the employee.

(d) Unilaterally instituting and thereafter enforcing changes in policy regarding union representation during absence counseling sessions involving employees repre-

---

rant the issuance of such a broad order, we shall order Respondent to cease-and-desist from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. See *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

Respondent's request for oral argument is hereby denied inasmuch as the record, the exceptions, and the briefs submitted adequately present the issues and the positions of the parties.

sented by Oil, Chemical and Atomic Workers International Union, Local 4-447, in the appropriate unit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Revoke and remove from its records all disciplinary warnings, notices, memorandums, and any other written notations issued to employee Gary Sullivan, or any other employee represented by the aforesaid Union, since September 6, 1978, resulting from application of its August 29, 1978, absence counseling sessions through which it refused to allow union representation during those absence counseling sessions after the employee requested union representation.

(b) Upon request by the aforementioned labor organization, bargain with it as the exclusive representative of all the employees in the unit described below, concerning any changes Respondent desires to make in the wages, hours, and terms and conditions of employment of the employees in said unit, including any changes in policy regarding absence counselig sessions. The unit is:

> All production, maintenance, and construction employees, including laboratory employees, employed by Respondent at its Refinery in Good Hope, Louisiana; excluding office clerical employees, the chief chemist, shift foreman, guards and supervisors as defined in the Act.

(c) Post at its Good Hope, Louisiana, refinery copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional director for Region 15, after being duly signed by Respondent's authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 26, 1979.

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

9. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTING PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unilaterally institute and thereafter enforce changes in policy regarding union representation during absence counseling sessions involving employees represented by Oil, Chemical and Atomic Workers International Union, Local 4-447, in the appropriate unit.

WE WILL NOT REQUIRE an employee to take part in any absence counseling session without union representation if such representation has been requested by the employee.

WE WILL NOT discipline or threaten to discipline any employee for seeking union representation during an absence interview or for otherwise attempting to enforce the provisions of our collective bargaining agreement with the Oil, Chemical and Atomic Workers International Union, Local 4-447, regarding that employee's, or any other employee's, right to requests and receive union representation at any stage of disciplinary procedures.

WE WILL NOT discipline or threaten to discipline any employee for attempting to serve as the representative of another employee at any interview or meeting where the latter has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

WE WILL NOT in like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL remove all disciplinary warnings, notices, memorandums, and any other written notations in our files issued to Gary Sullivan, or any other employee represented by the Union, since September 6, 1978, resulting from application of our August 29, 1978, absence counseling system through which union representation was refused the respective employee following his request for such representation.

WE WILL, at the request of Oil, Chemical and Atomic Workers International Union, Local 4-447, bargain with it, as the exclusive representative of all employees in the unit described below, concerning any changes we desire to make in the wages, hours, and terms and conditions of employment of the employees in said unit, including any changes in policy regarding absence counseling sessions. The unit is:

> All production, maintenance, and construction employees, including laboratory employees, employed by us at our refinery in Good Hope, Louisiana; excluding office clerical employees, the chief chemist, shift foreman, guards and supervisors as defined in the Act.

GOOD HOPE REFINERIES, INC.

_____

(Employer)

By _____

(Representative) (Title)

Dated _____

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Room 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113, Telephone 504–589–6389.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

Case No. 15-CA-7069

GOOD HOPE REFINERIES, INC.

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, LOCAL 4-447

John Hayduke, Esq. and
John Curley, Esq.,
for the General Counsel.

John A. Meagher, Esq.
for the Respondent.

Gail Simmons,
for the Charging Party.

DECISION

Statement of the Case

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on February 20, 1979, at New Orleans, Louisiana, pursuant to a charge filed on October 5, 1978, and amended on October 30, 1978, and a complaint which issued on November 3, 1978, and was amended on January 18, 1979, and again on February 20, 1979.

The complaint alleges Respondent violated Section 8(a)(1), (3) and (5) of the Act by unilaterally changing a pro-

vision of the collective bargaining contract, denying an employee union representation in an interview with supervision which the employee reasonably believed may have resulted in disciplinary action, threatening to discipline an employee for not answering questions in an interview unless union representation was provided and threatening to discipline an employee for attempting to serve as union representative for an employee being interviewed.

Upon the entire record and from my observations of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I hereby make the following:

Findings and Conclusions

I. Commerce

Respondent, Good Hope Refineries, Inc., admitted and I find that it is an employer engaged in commerce within the meaning of the Act.

II. Labor Organization

Oil, Chemical and Atomic Workers International Union Local 4-447 is a labor organization as defined in the Act.

III. The Alleged Unfair Labor Practices

On August 29, 1978, Respondent mailed to all employees in the collective bargaining unit, two documents signed by its Manager of Personnel. The first advised employees that effective September 6, 1978, all employees were to report to Personnel upon their return from unexcused full or partial absences. The second document advised employees that all Respondent's employees are required to maintain satisfactory attendance, listed several types of absences which are specifically "excused" under

the contract, and stated that employees tardy or absent will be subject to disciplinary action including warnings, suspension and termination. On that same day Respondent advised the Union that it was mailing the two documents to the employees.

Subsequently, by letter dated September 7, 1978, the Union protested that the August 29, documents constituted unilateral changes.

Prior to September 6, 1978, simliar counseling of employees regarding absences were performed by the immediate supervisor of the respective employee, usually on the job. On those occasions when employees were counselled in an office they were permitted to have union representation on request.

On September 6, 1978, employee Gary Sullivan returned to work after missing the 3 preceding days. Prior to missing work Sullivan asked and received permission from his supervisor to miss the first of those three days, September 5, for the purpose of taking his daughter to the hospital for an operation. Sullivan did not obtain prior permission to miss work on September 6 and 7. Those absences were necessitated by the death and funeral of Sullivan's aunt. After beginning work on the 8th, Sullivan was told by his supervisor that he had to see Mr. Jerry Deutsch (Manager of Personnel) since he had missed work. Sullivan asked Union Steward Gail Simmons to accompany him to Deutsch's office. Simmons checked with his supervisor and was granted permission to accompany Sullivan. Sullivan and Simmons then went over to the main offices where Deutsch's office is located in a separate building approximately 300 yards from the building where they work. However, Deutsch had been called away from his office and after waiting for about an hour, Sullivan and Simmons were called back to their work area.

Later that morning Sullivan was directed by his supervisor to see Deutsch at 11:00 o'clock. The supervisor told Sullivan that Deutsch had said he would not need union representation. Shortly thereafter, Sullivan saw Gail Simmons and he told Simmons that he was to see Deutsch but that Deutsch had said he didn't need union representation. Simmons called Deutsch and advised Deutsch that Sullivan had requested union representation and that Sullivan was entitled to representation under the contract. Deutsch replied that Sullivan did not need representation. Then he asked Simmons what he was doing in Deutsch's office earlier that morning. Simmons replied that he had been there at Sullivan's request to represent Sullivan. Deutsch stated that he wanted to see Sullivan at 11:00 and Sullivan didn't need representation but he wanted to see him (Simmons) at 11:15, and "you do need union representation, but I'll provide it for you." Simmons told Sullivan to meet Deutsch at 11:00 but not to answer questions about his absences.

When Sullivan went to Deutsch's office at 11:00, Deutsch told him the reason he was there was for Deutsch to find out why he had been off 3 days. According to Sullivan, Deutsch then said, "well, you're not here for a reprimand, I just want to know why you were off those 3 days." Sullivan requested union representation. Deutsch replied, "if you get union representation over here, it could lead to a letter or discipline." Sullivan then refused to answer Deutsch's question about the 3 days absence. Deutsch asked Sullivan to step out of the office for a moment. Gail Simmons and another union steward, Travis Edwards, were waiting outside Deutsch's office and were called in as Sullivan walked out. Shortly thereafter, Sullivan was called back in and, with Simmons and Edwards present, explained his absences to Deutsch. Deutsch told Sullivan that if Clevenger (Sullivan's supervisor) had ex-

cused him on Tuesday (September 5), there was nothing he (Deutsch) could do about that, but that he would not excuse the time off for his aunt's funeral. Deutsch told Sullivan that he had not needed union representation that morning but that his (Sullivan's) refusal to talk constituted insubordination and a letter would be entered into his file.

A "warning" was placed in Sullivan's file dated 9/11/78, which stated:

> Current Company Attendance Policy requires that employees report to Personnel upon their return from unexcused absence. Upon your return from unexcused absence you were instructed to report to me. In our meeting you refused to answer any questions concerning your absence unless supplied with Union Representation. You were informed that Union representation was not necessary since this was not a disciplinary action. Still you refused to cooperate.
>
> Your refusal to cooperate in the administration of Company policy represents a disregard for that policy and cannot be tolerated.
>
> You are hereby warned that further refusal to cooperate with the management of this company will result in further disciplinary action which may include suspension or termination.

IV. Conclusion

(a) The Weingarten issue:

In *N.L.R.B. v. J. Weingarten, Inc.*,[1] the Supreme Court upheld the Board's construction that Section 7 of the Act creates a statutory right in an employee to refuse to sub-

1. 420 U.S. 251, 88 LRRM 2689 (1975).

mit without union representation to an interview which he reasonably fears may result in his discipline. The Court approved the Board's holding that "reasonable ground" for fearing disciplinary action will be measured "by objective standards under all the circumstances of the case," and stated that it would reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

The Board has had several opportunities to apply the Weingarten test.[2] In *Amoco Chemical Corp.*, 237 NLRB No. 69 (1978), the Board adopted an Administrative Law Judge's finding that an employer did not violate Section 8(a)(1) in connection with interviews involving counseling for excessive absences to which two employees were required to attend without union representation. The Judge had found that neither employee had reasonable grounds for believing that the interview would result in disciplinary action, because prior to the interviews, the employees were informed that the counseling sessions were not a disciplinary meeting and the results of the meeting would not be recorded in their personnel file. The record in that case also revealed that such oral discussions with an employee were not a condition precedent to the imposition of discipline.

In *General Electric Company*, 240 NLRB No. 66 (1979), the Board found no violation where the employee was informed, in response to a statement by the employee, that he would not be disciplined in any manner but that the most he would get would be a contact slip. The Board found that the evidence clearly indicated that a contact

2. e.g., *Certified Grocers of California*, 227 NLRB 1211; *Southwestern Telephone Company*, 227 NLRB 1223; *Climax Molybdenum Company*, 227 NLRB 1189; *Alfred M. Lewis, Inc.*, 229 NLRB 757; and *General Electric Company*, 240 NLRB No. 66.

slip was not a form of discipline in that plant and that fact was known to the employees. Also, when the employee started to walk away from the interview to seek his union steward, the interviewing supervisor said he would locate and bring back the steward if the employee would return to work. The employee persisted in walking away from his work. His subsequent warning notice and suspension for insubordination were found not to violate the Act.

In the instant case, I must determine by applying objective standards, whether Sullivan reasonably feared his interview with Deutsch could result in his discipline. The evidence reveals that when Sullivan returned to Deutsch's office at 11:00, he was told, "well, you're not here for a reprimand, I just want to know why you" were off those 3 days.[3]

---

3. I credit Sullivan's version of his interview with Deutsch. Sullivan impressed me as a straightforward and candid witness who appeared to testify without regard to whether his answer would help on hurt his position. However, I did not find Mr. Deutsch a candid witness. My observation of Mr. Deutsch's demeanor and testimony convinced me his testimony was not reliable. In many instances Mr. Deutsch evaded questions by General Counsel. For example he was asked on several occasions if his absence interviews with employees were not conducted at least in part, to determine why the employee was absent. At various times Mr. Deutsch indicated that was a purpose but not the sole purpose. At another point Mr. Deutsch indicated that was not a purpose of the interviews. Nevertheless, a review of the record demonstrates that Mr. Deutsch never succeeded in stating any purpose for the interviews other than to find out why the employee missed work. He did, in response to Respondent's questions, supply several reasons why it was important for him to know why the particular employee was absent but the fact remained that the only reason he gaxe for the interviews was to learn why the employee missed work. Additionally, several documents received in evidence which originated from Mr. Deutsch demonstrate that the purpose for the absence interviews was to determine why the absence occurred. Also, it appeared that Mr. Deutsch altered his testimony on occasion in an effort to satisfy apparent defects in Respondent's defense. Deutsch

The collective-bargaining agreement between Respondent and the Union also addresses the issue before me:

> An employee may request union representation at any stage of the disciplinary procedure directed toward the said employee, including the investigatory stage, and such representation shall not be denied by the Company. The Union agrees that it will furnish such representation to the employee.

The record is uncontested that several of the Weingarten elements are present here. Sullivan was called in for an interview with the Manager of Personnel and he did request union representation. Sullivan was not given the option of having the interview without union representation or having no interview. The issue here is simply one of whether Sullivan reasonably feared his interview could result in discipline.

In support of his position, General Counsel contends Sullivan's interview was an investigatory interview which could have resulted in discipline to Sullivan. The record supports General Counsel's argument.

Absences are categorized by Respondent as excused or unexcused. Deutsch admitted that he is authorized to determine whether an absence is excused or unexcused and that at least one of the purposes of his inquiry at the absence interviews was to decide whether to excuse or not excuse an absence. The record reflects that employees have a reasonable basis for believing that that determina-

---

testified that he asked why an employee was absent often for the purpose of doing something to benefit the employee but that whenever an employee indicated he didn't want to talk about the reason for his absence, he (Deutsch) would immediately drop the subject. In the instant matter, Mr. Deutsch did not drop the subject when Sullivan stated he did not wish to answer Deutsch's questions about his absences.

tion could result in their discipline. For example the contract provides that three consecutive unexcused absences may result in an employee losing his seniority. Additionally, Deutsch's August 29, letter to employees indicated that absences not approved by the Personnel Department could result in discipline which may include suspension or termination.

Respondent contends that absences which do not fall within that group of absences clearly identified as "excused" in the contract are automatically unexcused. That contention was refuted by Deutsch's admission that he had the authority to excuse absences and that that determination was one of his main concerns in questioning Sullivan about two of his three absences.

General Counsel also argues that the evidence shows that the counseling sessions play a role in the disciplinary procedure and that the counseling sessions are relied upon as a basis for disciplining an employee. Again, the evidence supports General Counsel's position.

Several "warning letters" were received in evidence which indicated the warning was issued after a review of the employee's record showed the employee had been "counseled" on a number of occasions. Also, the record indicates that on occasion written recordation of absence counseling is retained in the employee's file, a file characterized as a "disciplinary file" by Mr. Deutsch. Respondent contends that Weingarten is satisfied in those instances because Deutsch, knowing before the interview that a written recordation of the interview would go into the employee's disciplinary file, would, on those occasions, provide union representation for the employee. Such a practice demonstrates a misunderstanding of Weingarten. Weingarten is concerned with the employee's, not the personnel manager's expectations. Regardless of what

Deutsch expected of the interview, the issue is whether Sullivan, considering factors including Respondent's practice of phrasing warnings to indicate they were predicated on past counseling sessions and occasionally retaining notations of counseling sessions in disciplinary files, reasonably feared his interview could lead to discipline.

On the basis of the above facts and the record as a whole, I am convinced that it was Respondent's practice to consider past counseling sessions in determining whether to issue more serious disciplinary measures such as warnings. I am also convinced that on occasion, particularly when the counseling session was memoralized with a written notation to the employee's discipline file, the counseling itself was considered a form of discipline.[4]

I am also persuaded that other factors including the formality of Deutsch's August 29, letter advising employees to report to Personnel following unexcused absence, and the requirement that employees report to Personnel, an office in the main office building away from the work area, contributed to a reasonable fear that the interview would result in discipline. The August 29, letter to employees was sent certified mail, return receipt requested. Sullivan testified that the Deutsch interview was only the second occasion on which he had been called into a supervisor's office and the other occasion was when he started to work for Respondent.

Therefore, I find that Gary Sullivan reasonably feared the September 8, interview could result in discipline.

The subsequent warning to Sullivan for not answering Deutsch's questions during the interview also constitutes a violation since Sullivan was exercising his Section 7 rights in not responding to the questions.[5]

---

4. Cf. *Certified Grocers of California*, 227 NLRB 1211.

5. *I.L.G.W.U. v. Quality Mfg. Co.*, 420 U.S. 256, 88 LRRM 2698 (1975).

(b) The Alleged Threat to Simmons:

On September 8, Gail Simmons was requested to represent Gary Sullivan in Sullivan's absence interview. Simmons checked with his supervisor and was permitted to accompany Sullivan. Thereafter, in a phone call with Manager of Personnel, Deutsch, Simmons was directed to report to Deutsch to explain why he accompanied Sullivan to Deutsch's office. Deutsch told Simmons he would need union representation.

Respondent defends Deutsch's action by contending it was necessary for Deutsch's action by contending it was necessary for Deutsch to select employee's union representatives in order to avoid work disruptions. However, the evidence is uncontested that Simmons sought and received permission from his supervisor to accompany Sullivan.

Simmons by seeking to represent Sullivan, was exercising protected Section 7 rights.[6] Deutsch's direction to Simmons to report to his office to explain those actions violates Section 8(a)(1). Deutsch's comment that Simmons would need union representation which he (Deutsch) would furnish, a threat that additional disciplinary action may follow, is further violation of Section 8(a)(1).

(c) The Alleged Unilateral Change:

By Mr. Deutsch's August 29, 1978, letter to employees, Respondent changed from a policy of absence counseling by employees' immediate supervisor to one of counseling by Personnel. The evidence reflects no occasion in which an employee was denied union representation upon request during an absence interview prior to Deutsch's announced change. However, following Deutsch's letter,

6. *I.L.G.W.U. v. Quality Mfg. Co., supra.*

employees were, at least on occasion, denied union representation during those interviews. The Union was simply notified on the mailing of Deutsch's letters to employees on the date of the mailing and was not offered an opportunity to bargain about this change in policy.

In view of my findings above and the record as a whole, I find the change in absence counseling constitutes a unilateral change from the contractual provision regarding union representation at any stage of the disciplinary procedure. Respondent's action involves a mandatory subject of bargaining and violates Section 8(a)(5).[7]

Upon the foregoing findings of fact and upon the entire record, I hereby make the following:

Conclusions of Law

(1) Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(2) Oil, Chemical and Atomic Workers International Union, Local 4-447, is a labor organization within the meaning of Section 2(5) of the Act.

(3) By calling its employee to account for his efforts to represent another employee and threatening its employee with discipline for those efforts, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(4) By requiring its employee to participate in an interview which the employee reasonably anticipated could have resulted in discipline, without union representation following the employee's request for representation, Re-

7. *Alfred M. Lewis, Inc.*, 229 NLRB 757.

spondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(5) By disciplining its employee for refusing to answer questions absent union representation during an interview in which he requested and was entitled to union representation, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

(6) By unilaterally changing its practice of absence counseling of employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

(7) The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

ORDER

Respondent, Good Hope Refineries, Inc., its officers, agents, successors and assigns, shall:

---

8. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Interfering with, restraining and coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by: requiring its employees to account for their efforts to represent other employees in accordance with terms of the collective bargaining contract; and theratening to discipline its employees for their efforts to represent other employees in accordance with terms of the collective bargaining contract.

(b) Discouraging membership or participation in activities of Oil, Chemical and Atomic Workers International Union, Local 4-447, or in any other labor organization, by disciplining its employees for refusing to fully participate in supervisory interviews when the employee request and is entitled to union representation.

(c) Requiring any employee to take part in any counseling session, or disciplinary interview without union representation if such representation has been requested by the employee.

(d) Instituting unilaterally and thereafter enforcing changes in policy regarding absence counseling sessions and disciplinary interviews involving employees represented by Oil, Chemical and Atomic Workers International Union, Local 4-447.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to organize, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action, which is found necessary to effectuate the policies of the Act:

(a) Cancel, withdraw and rescind the August 29, 1978, (effective September 6, 1978) absence counseling system in effect as to employees represented by the aforesaid Union.

(b) Revoke and remove from its records all disciplinary warnings, notices, memoranda and any other written notations issued to employee Gary Sullivan or any other employee represented by the aforesaid Union, since September 6, 1978, resulting from application of its August 29, 1978, absence counseling system where it refused to allow union representation during those absence counseling sessions after the employee requested union representation.

(c) Upon request by the aforementioned labor organization, bargain with it as exclusive representative of all its employees in the unit described:

> All production, maintenance, and construction employees, including laboratory employees employed by Respondent at its refinery in Good Hope, Louisiana; excluding office clerical employees, the chief chemist, shift foreman, guards and supervisor as defined in the Act.

(d) Post at its Good Hope, Louisiana refinery, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director

---

9. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

for Region 15, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 11, 1979.

/s/ J. Pargen Robertson
J. PARGEN ROBERTSON
Administrative Law Judge

APPENDIX

FORM NLRB-4727 (9-69)

JD-744-79

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT INSTITUTE and thereafter enforce absence counseling practices regarding union representation at counseling sessions and disciplinary interviews without bargaining with the bargaining representative of the employees involved in those practices.

WE WILL NOT require any employee to take part in any counseling session or disciplinary interview without union representation if such representation has been requested by the employee.

WE WILL CANCEL, withdraw and rescind the August 29, 1978, absence counseling system in effect as to employees represented by OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 4-447.

WE WILL REMOVE all disciplinary warnings, notices, memoranda and any other written notations in our files issued to Gary Sullivan or any other employee represented by the Union, since September 6, 1978, resulting from application of our August 29, 1978, absence counseling system where union representation was refused the respective employee following his request for such representation.

WE WILL NOT DISCIPLINE or threaten discipline to any employee for seeking union representation during an absence interview or for otherwise attempting to enforce provisions of our collective-bargaining agreement with the OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 4-447 regarding that employee's or any other employee's rights to request and receive union representation at any stage of disciplinary procedures.

WE WILL NOT DISCIPLINE or threaten to discipline any employee for attempting to serve as representative of another employee at any interview or meeting where the latter employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

WE WILL NOT in any other manner interfere with, restrain, or coerce any employee in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL at the request of OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 4-447, bargain with it as exclusive representative of all employees in the unit described below:

> All production, maintenance, and construction employees, including laboratory employees employed by Respondent at its refinery in Good Hope, Louisiana; excluding office clerical employees, the chief chemist, shift foreman, guards and supervisor as defined in the Act.

GOOD HOPE REFINERIES, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower - Room 2700 - 1001 Howard Avenue, New Orleans, Louisiana 70113 Telephone No. (504) 682-6389.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3580

GOOD HOPE REFINERIES, INC.,

Petitioner, Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

JUDGMENT

Before: RONEY, KRAVITCH and TATE, Circuit Judges.

On June 23, 1980, being fully advised in the premised, the Court handed down its decision enforcing the Board's order; the petition for review is denied.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Relations Board be enforced and that Good Hope Refineries, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order contained.

Costs are taxed against the petitioner, cross respondent.

FILED: JUNE 23, 1980

ISSUED AS MANDATE: JULY 15, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3580

GOOD HOPE REFINERIES, INC.,

Petitioner, Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

Petition for Review and Cross Application of An Order of the National Labor Relations Board

Filed August 27, 1980

ORDER:

The motion of PETITIONER for a recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 15, 1980, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the

writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Paul H. Roney
PAUL H. RONEY
United States Circuit Judge

No. 80-412

Supreme Court, U.S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

GOOD HOPE REFINERIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-412

GOOD HOPE REFINERIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally refusing to allow its employees union representation during absence counseling interviews, in violation of its contract with the Union and established past practice.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Alfred M. Lewis, Inc. v. *NLRB*, 587 F. 2d 403 7

Allied Chemical & Alkali Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 6

Ford Motor Co. v. *NLRB*, 441 U.S. 488 6

Local 24, International Brotherhood of Teamsters v. *Oliver*, 358 U.S. 283 6

Local 189, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 6

Murphy Diesel Co. v. *NLRB*, 454 F. 2d 303 7

NLRB v. *Amoco Chemicals Corp.*, 529 F. 2d 427 7

NLRB v. *C & C Plywood Corp.*, 385 U.S. 421 6

NLRB v. *Gulf Power Co.*, 384 F. 2d 822 8

PREVIOUS PAGE WAS BLANK

Page

Cases—Continued:

NLRB v. *Katz*, 369 U.S. 736 6

NLRB v. *Miller Brewing Co.*, 408 F. 2d 12 7

NLRB v. *Weingarten, Inc.*, 420 U.S. 251 8

NLRB v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 6

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 7, 29 U.S.C. 157 8

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4, 5, 6, 7, 8

Section 8(a)(3), 29 U.S.C. 158(a)(3) 5

Section 8(a)(5), 29 U.S.C. 158(a)(5) 4, 5, 6, 7, 8

Section 8(d), 29 U.S.C. 158(d) 6, 7

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1sa-7sa) is reported at 620 F. 2d 57. The decision and order of the Board (Pet. App. 8sa-32sa) are reported at 245 N.L.R.B. No. 39.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33sa) was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-5).

STATEMENT

1. On August 29, 1978,[1] the Company sent two documents signed by its manager of personnel, Jerry Deutsch, concerning changes in its policy with respect to employee absences to its employees. The first document advised the employees that, effective September 6, they were to report to the Company's personnel office upon their return from unexcused full or partial absences. The second document stated that all of the Company's employees were required to maintain satisfactory attendance, listed several types of absences specifically excused under the contract between the Company and the Union,[2] and indicated that employees who were absent or

---

[1]All dates are in 1978, unless otherwise indicated.

[2]Oil, Chemical and Atomic Workers International Union, Local 4-447.

tardy would be subject to disciplinary action including warnings, suspension and termination (Pet. App. 17sa-18sa).

Prior to the implementation of this system, counseling of the Company's employees concerning absences was performed by the immediate supervisor of the respective employee, generally on the job. Whenever an employee was counseled in an office, he was permitted to have union representation upon request (Pet. App. 18sa). The policy of providing union representation to employees during absence counseling sessions was in accordance with the following provision of the collective bargaining agreement then in effect between the Company and the Union (Pet. App. 23sa):

> An employee may request union representation at any stage of the disciplinary procedure directed toward the said employee, including the investigatory stage, and such representation shall not be denied by the Company. The Union agrees that it will furnish such representation to the employee.

Simultaneously with mailing the two documents concerning its new absence policy to its employees on August 29, the Company advised the Union that it was doing so. In response, by a letter dated September 7, the Union protested that the policies announced in the August 29 documents constituted unilateral changes (Pet. App. 18sa).

On September 8, employee Gary Sullivan returned to work following a three-day absence. Sullivan had received permission from his supervisor to miss work on September 5, the first of the three days, in order to take his daughter to the hospital. Sullivan had not received permission to miss work on September 6 and 7. Those absences were necessitated by the death and funeral of Sullivan's aunt (Pet. App. 18sa).

Upon returning to work on September 8, Sullivan was instructed by his supervisor to report to the office of Personnel Manager Deutsch. Sullivan requested Union Steward Gail Simmons to accompany him to Deutsch's office and Simmons received permission from his supervisor to go with Sullivan, but Deutsch was not in his office when they arrived and after waiting for about an hour they returned to their work area (Pet. App. 18sa). Sullivan then was advised by his supervisor to see Deutsch later that morning. The supervisor also told Sullivan that Deutsch had said that he would not need union representation. After discussing the matter with Sullivan, Union Steward Simmons called Deutsch and advised him that Sullivan had requested union representation and that he was entitled to representation under the contract. Deutsch told Simmons that Sullivan did not need union representation, but that he also wanted to see Simmons and that " 'you do need union representation, but I'll provide it for you' " (Pet. App. 19sa).

When Sullivan reported to Deutsch's office later that morning, Deutsch told him, " 'well, you're not here for a reprimand, I just want to know why you were off those 3 days.' " At that point, Sullivan requested union representation. Deutsch replied, " 'if you get union representation over here, it could lead to a letter or discipline.' " Sullivan then refused to answer Deutsch's question concerning his three-day absence. Subsequently, Gail Simmons and another Union steward were called to Deutsch's office, and Sullivan explained his absences to Deutsch in their presence. Deutsch stated that since Sullivan's supervisor had excused the first day of Sullivan's three-day absence Deutsch could do nothing about that, but that he would not excuse the two days Sullivan had taken off for his aunt's funeral. Deutsch also

told Sullivan that he had not needed union representation that morning and that Sullivan's refusal to answer questions without union representation constituted insubordination and would result in a letter of reprimand being placed in his file. On September 11, a written warning describing the above incident was placed in Sullivan's file (Pet. App. 19sa-20sa).

2. An administrative law judge found that the Company had violated Section 8(a)(1) of the National Labor Relations Act by requiring Sullivan to participate without union representation in an absence counseling interview that he reasonably anticipated could have resulted in his being disciplined, by disciplining Sullivan for refusing to answer questions after his request for union representation was denied, and by requiring Union Steward Simmons to account for his efforts to represent Sullivan at the interview and threatening Simmons with discipline for those efforts. The administrative law judge also found that petitioner's change in its absence counseling system constituted a unilateral change from the contractual provision allowing union representation at any stage of the disciplinary procedure, and thus violated Section 8(a)(5) of the Act since it involved a mandatory subject of bargaining (Pet. App. 26sa-28sa).

The Board affirmed the administrative law judge's findings of Section 8(a)(1) violations, and agreed that the Company's refusal to allow its employees union representation under its new absence counseling system violated Section 8(a)(5) and (1) of the Act as a unilateral change in its collective bargaining agreement with the Union.[3] The Board order requires the Company, *inter*

---

[3] The Board found (Pet. App. 9sa n.3), however, that the change in the Company's absence counseling system requiring that employees report to the personnel office rather than to their immediate

alia, to revoke and remove from its records all disciplinary warnings issued as a result of its change in policy concerning union representation at absence counseling interviews to employee Sullivan or any other employee represented by the Union and to bargain with the Union, upon its request, concerning any contemplated changes in employees' terms and conditions of employment, including changes in policy regarding absence counseling sessions (Pet. App. 8sa-12sa).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1sa-7sa). The court agreed with the Board that the Company's policy concerning union representation at absence counseling sessions was a mandatory subject of bargaining, and it concluded that substantial evidence supported the Board's finding that the Company's denial of an employee's request for representation at an absence counseling interview was a departure from past practice, which constituted an unlawful unilateral change (Pet. App. 5sa-7sa).

ARGUMENT

The Company does not dispute the Board's finding that its denial of the right to union representation in absence counseling sessions constituted a unilateral modification of its collective bargaining agreement with the Union, but rather contends that this unilateral change was not violative of Section 8(a)(5) and (1) of the Act because it did not involve a mandatory subject of bargaining. There is no merit to this claim.

---

supervisor was a valid exercise of a management right. It also declined (Pet. App. 9sa n.2) to decide whether the warning issued to employee Sullivan violated Section 8(a)(3), as well as Section 8(a)(1), of the Act.

It is well settled that an employer acts in derogation of its bargaining obligation under Section 8(d) of the National Labor Relations Act, and thereby violates Section 8(a)(5) and (1) of the Act, when it alters a contractual provision that is a mandatory subject of bargaining during the effective period of the contract without the consent of the Union.[4] *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 185-188 (1971); see *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); cf. *NLRB* v. *Katz*, 369 U.S. 736, 743, 747 (1962). In general, a matter is a mandatory subject of bargaining within the meaning of Section 8(d) if it "settle[s] an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra,* 404 U.S. at 178. Accord, *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 294-295 (1959); *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). Moreover, the "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise." *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965). See also *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495, 497 (1979) ("[c]onstruing and applying the duty to bargain and the language of § 8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function").

In the instant case, the Board concluded that the ability of employees to obtain union representation during absence counseling interviews was a mandatory subject of bargaining. The court of appeals upheld the Board's

---

[4]Section 8(d) of the Act defines the subjects about which an employer must bargain as "wages, hours, and other terms and conditions of employment * * *."

determination, concluding (Pet. App. 7sa) that, in the circumstances presented, the opportunity to obtain representation in absence counseling sessions "had a direct impact on the employment relationship, since the employee's refusal to submit to the counseling session in the absence of union representation became a permanent part of an employee's personnel file which could affect his future job security." The Board's determination is entirely consistent with and supported by the relevant case-law. In *Alfred M. Lewis, Inc.* v. *NLRB*, 587 F. 2d 403, 412 (9th Cir. 1978), the court held that the right of employees to have union representation at counseling sessions that may result in disciplinary action is a mandatory bargaining subject within the meaning of Section 8(d) of the Act since it "directly concern[s] an aspect of the employer-employee relationship * * * and such representation could potentially have a substantial impact on job security and tenure."[5] Cf. *NLRB* v. *Amoco Chemicals Corp.*, 529 F. 2d 427, 431 (5th Cir. 1976) (unilateral change from practice of issuing informal warnings to disciplinary system involving written reprimands violated Section 8(a)(5)); *Murphy Diesel Co.* v. *NLRB*, 454 F. 2d 303, 307 (7th Cir. 1971) (unilateral institution of formal disciplinary procedure regarding absences and tardiness and requirement that employees submit formal written explanations of absences and tardiness rather than oral excuses violated Section 8(a)(5) and (1)); *NLRB* v. *Miller Brewing Co.*, 408 F. 2d 12 (9th Cir. 1969) (unilateral promulgation of general plant regulations and accompanying

---

[5] The *Lewis* court distinguished between counseling that "was an integral part of the disciplinary system and was deemed by management to be a preliminary stage in the imposition of discipline" and meetings at which the employee simply was advised of disciplinary action that was to be taken against him, without any interrogation of him, and held that an employee was entitled to union representation only at the former type of interview (587 F. 2d at 410-411).

enforcement machinery violated Section 8(a)(5) and (1)); *NLRB* v. *Gulf Power Co.*, 384 F. 2d 822, 825 (5th Cir. 1967) (unilateral institution of safety rules and practices violated Section 8(a)(5) and (1)).

The Company contends (Pet. 8-13) that the employees' Section 7 right to union representation at an investigatory interview, recognized in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251 (1975), is so "uniquely individual" that it cannot be a mandatory bargaining subject. If it were, the Company argues (Pet. 11), not only could the employees' union representative insist that the right be incorporated in the collective bargaining agreement, but the employer also could insist that there be no right to representation and, once an impasse were reached, "the employer would then be within its rights to implement [its position], thus stripping the individuals of any right to representation."

The Company's contention is fallacious. A union, in bargaining for contractual recognition of the employees' right to union representation, is seeking to *augment* the protection afforded by the Act. The mere fact that the union fails to secure the additional *contractual* protection of the right to union representation does not mean that it has waived the *statutory* right to union representation that this Court recognized in *NLRB* v. *Weingarten, Inc., supra*. Thus, even if an impasse on the issue of the inclusion in the contract of a right to union representation were reached, the employer would not be free to deprive the employees of their statutory right to union representation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board

NOVEMBER 1980

DOJ-1980-11